

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

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74-1775

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United States Court of Appeals
FOR THE SECOND CIRCUIT

HUGO STINNES STEEL AND METALS COMPANY,
(Division of Hugo Stinnes Corporation),

Plaintiff-Appellant,
against

S.S. ELBE OLDENDORFF, her engines, boilers, etc.;
EGON OLDENDORFF and ATLANTIC SHIPPING
COMPANY, S.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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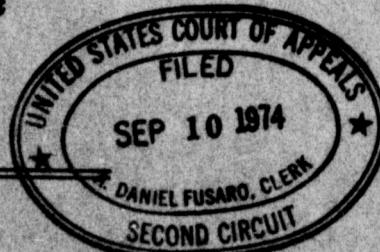


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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1775

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Plaintiff-Appellant,

-against-

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etc., EGON OLDENDORFF and ATLANTIC SHIPPING
COMPANY, S.A.,

Defendants-Appellees.

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REPLY BRIEF FOR
PLAINTIFF APPELLANT

Plaintiff-Appellant respectfully submits this brief
in reply in order to counter some of the issues raised by
ATLANTIC SHIPPING COMPANY, S.A. (designated "Defendant-
Appellee.")

POINT I

PLAINTIFF-APPELLANT'S NOTICE OF APPEAL
IS SUFFICIENT TO PLACE BEFORE THE CIRCUIT
COURT THE DISTRICT COURT'S DENIAL OF
TRANSFER.

Defendant-Appellee contends that Plaintiff-Appellant's Notice of Appeal is insufficient to place the denial of transfer before the Circuit Court. However, the cases cited in support of that contention have been rendered ineffective by subsequent decisions. As Professor Moore states:

"12 Those parts of the decisions in Long v. Union Pacific R.R. (CA 10th, 1953) 206 Fed 829, 19 FR Serv 73b.12, Case 1, Stone v. Wyoming Supreme Court (CA 10th, 1956) 236 F2d 275, 23 FR Serv 73b. 12, Case 1, and Gannon v. American Airlines, Inc. (CA 10th 1957) 251 F2d 476, 24 FR Serv 73b.12, Case 1, which held the notices of appeal involved to be ineffective by reason of insufficient designation would appear to be superseded by the decision in Cheney v. Moler (CA 10th, 1960) 285 F2d 116, 4 FR Serv2d 73b.12, Case 1. In any event, the earlier decisions of the Tenth Circuit would not appear to survive the views expressed by the Supreme Court in Foman v. Davis, n 7, supra. ***".
9 Moore's Federal Practice ¶203.18.

Defendant-Appellee's reliance on Benenson v. United States, 385 F2d 26 (2 Cir. 1967) is also misplaced since that case centered around an express intent by Appellant to limit his issues on appeal.

In this action, Plaintiff-Appellant originally made a motion pursuant to 28 U.S.C.A. 1404(a) to transfer the action to the Southern District of Georgia, which motion was denied by Judge Metzner despite the lack of any opposition. At the time of the hearing on March 25, 1974, this motion was renewed,^{1/} again denied and an order dismissing the case for lack of prosecution was entered immediately thereafter.

It is manifest that Plaintiff-Appellant's Notice of Appeal encompass the entire judgment, including the denial of transfer, which gave rise to it. Any technical defect, which certainly did not mislead or work to the prejudice of Defendant-Appellee, does not oust this Court of jurisdiction to review the denial of transfer. Foman v. Davis, 371 U.S. 178 (1962); Blitzstein v. Ford Motor Co., 288 F2d 738 (5 Cir., 1961).

^{1/} See p. 3 of Exhibit A to brief of Atlantic Shipping Company, S.A., where Judge Metzner stated, "Counsel orally renewed its previous motion, which was denied and the case dismissed upon the court being advised that no settlement was possible".

POINT II

THE DISTRICT COURT'S MISREADING OF FACTS
AND LAW ARE SUFFICIENT TO WARRANT A
REVERSAL.

At the outset, it must be noted that Judge Metzner denied Plaintiff-Appellant's motion pursuant to 28 U.S.C.A. 1404(a) despite the fact that no opposition had been filed. Unlike A. Olinick & Sons v Dempster Brothers, Inc., 365 F2d 439 (2 Cir., 1966), there was no "oral argument and submission of thorough affidavits and memoranda of law ...". [See Defendant-Appellee's brief, p. 13].

In support of its original motion, Plaintiff-Appellant merely set forth facts to sustain the statutory requirements of such a motion, and the denial was not predicated upon the failure to set forth such statutory requirements. In fact, the Ryniker affidavit [R. 13 & 14] clearly states that Plaintiff-Appellant had attempted service of process on Atlantic Shipping Company, S.A. but that said service was returned, that no jurisdiction could be obtained over owners, that such jurisdiction could be obtained in the Southern District of Georgia, and that necessary witnesses resided in the Southern District of Georgia.

In distinguishing the only case cited in its decision denying the transfer [Goldlawr v. Heiman, 369 U.S. 463 (1962)], the District Court misread the facts clearly set forth in the Ryniker affidavit. As in Goldlawr, supra, a service, albeit defective, had been made. Finally, Judge Metzner's opinion that [t]he whole purpose of the statute of limitations would be negative if this motion [to transfer] were granted." is erroneous as a matter of law. In fact, one primary purpose of 28 U.S.C.A. 1404(a) is precisely to overcome the statute of limitations problem. As stated by Chief Judge Lawrence in the companion case brought in the Southern District of Georgia, Hugo Stinnes Steel and Metals Co. v. Oldendorff, 372 F Supp. 705 (S.D. Ga. 1974):

"Reason would seem to tell us that a new and distinct action brought in another jurisdiction between the same parties on the same claim in which suit is pending be treated as an independent action for purposes of the statute of limitations. Extensive search, however, has turned up no authority holding in so many words that pendency of an unserved action in a United States district court tolls the period of limitation as to an untimely suit for the same claim brought in another federal district court. The dearth of precedent is probably due to 28 U.S.C. §1404(a) which was intended to avoid the danger of an action being barred as a result of being forced to commence another suit in the appropriate federal forum. See Orzulak v. Federal Commerce and Navigation Company, Ltd., D.C., 168 F. Supp. 15, 18. ***. 372 F. Supp. at 707 (emphasis supplied).

It is evident that the District Court based its denial upon an error of law and, as such, this error is subject to review. Internatio-Rotterdam, Inc. v. Thomson, 218 F2d 514, (5 Cir., 1955).

Although Plaintiff-Appellant did not rest after its motion to transfer had been denied, the denial served as the basis for an ultimate dismissal for lack of prosecution. Defendant-Appellee attempts to show that this case could have proceeded in New York by obtaining jurisdiction over owners. At p. 8 of its brief in opposition, Defendant-Appellee states that had "Atlantic been a party to the proceedings in the District Court ample evidence would have been presented to show that Plaintiff-Appellant would have caused the Court to have jurisdiction over Oldendorff ...". However, nowhere does Defendant-Appellee state how it could have been made a party to the proceedings and, on the contrary, denies that any jurisdiction existed over it. Further, Defendant-Appellee points to arrival of Oldendorff vessels in the United States during the very time it is conceded that the case was misplaced due to a clerical error or during the time that an unopposed motion to transfer the case was pending.

This case is not similar to the Crispin Company v.
S.S. JOWOOD, 1973 A.M.C. 2623, (S.D.N.Y. 1973) (not officially reported) since Plaintiff-Appellant here was active both before and after the admitted lapse caused by a clerical error.

CONCLUSION

DUE TO THE DISTRICT COURT'S ERROR, THE DENIAL OF PLAINTIFF-APPELLANT'S MOTION TO TRANSFER AND THE ORDER DISMISSING THE ACTION, SHOULD BE REVERSED.

Dated: September 10, 1974

Respectfully submitted,

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Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON , being duly sworn, deposes
and says that he is over the age of 18 years. That on the 10th
day of September , 1974, he served two copies of
Reply Brief for Plaintiff-Appellant on
Haight, Gardner, Poor & Havens, Esqs. , the attorney s
for Defendants-Appellees
by delivering to and leaving same with a proper person in charge of
their office at One State Street Plaza
in the Borough of Manhattan , City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

10th day of September , 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976